Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THE WATER WORKS AND SEWER BOARD OF THE CITY OF BIRMINGHAM, an Alabama public corporation,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS; THE CITY OF BESSEMER, ALABAMA; TOGO D. WEST, JR.; LIEUTENANT GENERAL A.E. WILLIAMS; AND COLONEL WILLIAM S. VOGEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

K. MARK PARNELL
Counsel of Record
MARY H. THOMPSON
GORHAM & WALDREP, P.C.
Attorneys for Petitioner
2101 6th Avenue North
Suite 700
Birmingham, Alabama 35203
(205) 254-3216

154703

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

13214

QUESTIONS PRESENTED

Did the United States Department of the Army Corps of Engineers improperly narrow the scope of its review of a permit application under section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act to construct an intake structure and pipeline on the Black Warrior River to withdraw up to 25 million gallons of water per day, thereby failing to consider the extent of the need for such water as required by the Clean Water Act, the National Environmental Policy Act, and its own regulations?

Did the United States Department of the Army Corps of Engineers improperly narrowly define the project purpose so as to eliminate reasonable alternatives under the Clean Water Act, the National Environmental Policy Act, and its own regulations?

PARTIES TO THE PROCEEDING

The Water Works and Sewer Board of the City of Birmingham, an Alabama public corporation; The United States Department of the Army, Corps of Engineers; The City of Bessemer, Alabama, an Alabama municipal corporation; Togo D. West, Jr, in his official capacity as Secretary of the Army; Lieutenant General A. E. Williams in his official capacity as Chief of Engineers; Colonel William S. Vogel in his official capacity as District Engineer; and The Governmental Utility Services Corporation of the City of Bessemer, Alabama, an Alabama public corporation.

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Petitioner, The Water Works and Sewer Board of the City of Birmingham, an Alabama public corporation, respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision, without opinion, of the United States Court of Appeals for the Eleventh Circuit is reported at *The Water Works and Sewer Board of the City of Birmingham v. United States Department of Army, Corps of Engineers*, 162 F.3d 98 (11th Cir. 1998). The unpublished decision of the United States Court of Appeals for the Eleventh Circuit on rehearing is *The Water Works and Sewer Board of the City of Birmingham v. United States Department of Army, Corps of Engineers*, No. 97-6882, (11th Cir. May 28, 1999). The opinion of the United States District Court for the Northern District of Alabama is reported at *The Water Works and Sewer Board of the City of Birmingham v. United States Department of Army, Corps of Engineers*, 983 F. Supp. 1052 (N.D. Ala. 1997). These proceedings arise from a final agency action by United States Department of Army Corps of Engineers dated March 17, 1997. These decisions and opinion are reproduced in the Appendix at pages 1a, 2a-80a and 81a-82a and the final agency action is reproduced in the Lodging Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 13, 1998. The Court of Appeals denied the timely petition for rehearing on May 28, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutes involved are: Section 10 of The Rivers and Harbors Act, 33 U.S.C. § 403; Section 404 of the Clean Water Act, 33 U.S.C. § 1344; Section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g); Section 510(2) of the Clean Water Act, 33 U.S.C. § 1370(a)(2); and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(E).

The regulations involved are 33 C.F.R. § 320.4; and 33 C.F.R. Part 325, App. B.

Each is set forth in pertinent part, in the Appendix at 83a-97a.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below.

Petitioner, The Water Works and Sewer Board of the City of Birmingham (the "Water Works"), filed its Complaint against the United States Department of Army Corps of Engineers, Togo D. West, Jr., in his official capacity as Secretary of the Army, Lieutenant-General A. E. Williams, in his official capacity as Chief of Engineers, Colonel William S. Vogel, in his official capacity as District Engineer (collectively, the "Corps"), and the City of Bessemer, Alabama ("Bessemer"), on November 16, 1995, in the United States District Court for the Northern District of Alabama, Southern Division ("District Court"). The Compliant sought judicial review of a final agency action pursuant to 5 U.S.C. §§ 701-06, and alleged that the defendants violated the Clean Water Act, the National Environmental Policy Act, and its

own regulations in issuing Bessemer a permit to construct an intake structure and pipeline in the Black Warrior River. Subsequently, the Water Works amended its Complaint to add the Governmental Utility Services Corporation of the City of Bessemer, Alabama, as a defendant.

Bessemer filed its Answer on December 8, 1995, and filed its Amended Answer on December 21, 1995. The Corps filed its Answer on January 16, 1996. On December 22, 1995, Bessemer filed its Motion for Summary Judgment and on January 22, 1996, the Corps filed its Motion for Summary Judgment. On January 31, 1996, the Water Works filed its Opposition to Bessemer's Motion for Summary Judgment, Motion for Limited Discovery and Hearing or, in the Alternative, Cross Motion for Summary Judgment and filed its Opposition to the Corps' Motion for Summary Judgment, Motion for Limited Discovery and Hearing or, in the Alternative, Cross Motion for Summary Judgment on February 12, 1996. On February 29, 1996, the parties jointly moved for a stay in the District Court's proceedings so that the Corps could conduct additional studies of the environmental impacts of the intake structure and pipeline. The proceedings were stayed on March 4, 1996.

On March 17, 1997, the Corps issued its Revised Statement of Findings concerning Bessemer's permit. *See* Lodging Appendix. On June 30, 1997, the Water Works filed its Second Amended Complaint challenging the revised findings and the permit issuance. Bessemer filed its Answer to the Second Amended Complaint on July 17, 1997, and the Corps filed its Answer on July 18, 1997. On July 30, 1997, Bessemer and the Corps filed their second Motions for Summary Judgment. On August 29, 1997, the Water Works filed its Opposition to the Corps' and Bessemer's

Motions for Summary Judgment, Motion for Limited Discovery and Hearing or in the Alternative Cross Motion for Summary Judgment. On October 22, 1997, the District Court entered its Order and Memorandum Opinion granting both Bessemer's and the Corps' Motions for Summary Judgment and denying the Water Works' Motion for Limited Discovery and Hearing or in the Alternative Cross Motion for Summary Judgment. On October 31, 1997, the Water Works filed its Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit (the "Court of Appeals").

Subsequently, Bessemer filed its Motion to Amend Judgment and Motion for Preliminary Injunction Pending Appeal on November 4, 1997, in the District Court. On November 12, 1997, Bessemer filed its Notice of Withdrawal of Motion seeking to withdraw its Motion to Amend Judgment and Motion for Preliminary Injunction Pending Appeal and the District Court granted said Motion on November 14, 1997. The Water Works filed its Re-Notice of Appeal with the Court of Appeals on December 3, 1997. On October 13, 1998, the Court of Appeals affirmed, without opinion, the ruling by the District Court. On November 25, 1998, the Water Works filed a Petition for Rehearing with the Court of Appeals which was denied on May 28, 1999. This petition for a writ of certiorari followed. Because the Court of Appeals did not issue a written opinion in this case, all references to the holdings and rulings relate to the written opinion issued by the District Court and affirmed by the Court of Appeals.

B. Statement of Material Facts.

The Water Works is an Alabama public corporation organized and existing pursuant to Alabama Code §§ 11-50-230 through 241 (1975) for the purpose of supplying water to the Birmingham metropolitan area. The Water Works has four separate sources for withdrawals of water: the Cahaba River, the Mulbery Fork of the Black Warrior River, the Sipsey Fork of the Black Warrior River, and Inland Lake. The Water Works is permitted to withdraw from the combination of its Mulberry and Sipsey Fork sources on the Black Warrior River, up to 155 million gallons per day ("mgd") of water. Thus, the Black Warrior River (the "River") is a major source of water supply for the Water Works.

Since 1951, the Water Works has supplied Bessemer with wholesale potable water for its system pursuant to a water purchase contract. Bessemer then resells the water to its own customers. Currently, the Water Works provides Bessemer with approximately 10 to 13 mgd of potable water. On June 2, 1995, Bessemer submitted an application for a Corps of Engineers permit pursuant to section 10 of the Rivers and Harbors Act (33 U.S.C. § 403) and section 404 of the Clean Water Act (33 U.S.C. § 1344) to construct a water intake structure on the River, along with a thirty-inch diameter transmission pipeline to connect to a proposed water treatment plant for withdrawal of up to 25 mgd of water.

The Corps issued a public notice requesting comments from interested persons regarding Bessemer's permit application. On August 11, 1995, the Water Works filed written comments in response to the public notice and requested a public hearing. In its comments, the Water Works

raised questions concerning the need for the project and the availability of alternatives to the project. The Water Works pointed out that the River is over stressed due to the many current uses of its waters. The Water Works also pointed out that it has the ability to supply Bessemer with an additional 15 mgd of water and has the capability of providing another 15 mgd of water in a short period of time, thereby meeting all of Bessemer's water supply needs. Further, because the Water Works can supply Bessemer from its four separate sources of supply, it can conserve water in the Black Warrior River, while withdrawing water from one or more of its other sources. Under its proposed project, Bessemer would have only one source, the Black Warrior River, and all of its demand would be withdrawn from the River.

On October 30, 1995, the Corps denied the Water Works' request for a public hearing, and on November 13, 1995, the Corps issued the permit to Bessemer. The Water Works argued in the District Court and the Court of Appeals that the Corps failed to consider numerous important factors and criteria in issuing Bessemer's permit. These factors included the public need for Bessemer's project, the evaluation of the impacts of the intended use of the project, and the availability of alternatives to the project. Because the River is a major source of water supply for the Water Works, the Water Works' concerns in this case center around the impacts that Bessemer's proposed project will have upon the River. The River is also an important natural resource for many uses other than water supply, including navigation and electric power supply. Thus, any decision to allow additional withdrawals should be carefully evaluated to determine the actual need for the water as well as any available alternatives to the additional withdrawal.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BY THE COURT BELOW RAISES IMPORTANT QUESTIONS OF FEDERAL LAW REGARDING WHETHER THE SCOPE OF THE CORPS' PUBLIC INTEREST REVIEW REGULATION IS LIMITED BY THE CORPS NEPA IMPLEMENTATION PROCEDURES.

The District Court found, and the Court of Appeals affirmed, that "the scope of the overall project review that the Corps is to undertake is governed by the National Environmental Policy Act ("NEPA") implementation procedures for the regulatory program that are contained at 33 C.F.R. Pt. 325 App. B § 7.b." (the "Appendix B regulations") *Water Works*, 983 F. Supp. at 1067. The District Court also found that "the extent of the entire project reviewable by the Corps under its public interest review is essentially the same as the extent of review permitted under the NEPA analysis." *Id.* This decision is based upon an impermissible construction of both the public interest review regulations and the Appendix B regulations. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Further, the decision is contrary to the purposes of the public interest review regulations which provide for a broad review and consideration of a wide range of factors. *See generally* 33 C.F.R. § 320.4.

In reaching its decision, the District Court relied upon several decisions which determined the scope of the Corps' review under NEPA for projects containing both federal and non-federal activities. *Water Works*, 983 F. Supp. at 1068–

69. These cases held that the scope of the Corps' review under NEPA was limited to the "federally controlled or regulated aspects of such projects." *See Sylvester v. United States Army Corps of Eng'rs,* 884 F.2d 394, 398 (9th Cir. 1989) ("*Sylvester I*"); *Winnebago Tribe v. Ray,* 621 F.2d 269, 273 (8th Cir. 1980); *Save the Bay, Inc. v. United States Corps of Eng'rs*, 610 F.2d 322, 327 (5th Cir. 1980). In *Sylvester I*, the Ninth Circuit held that the Appendix B regulations limited the scope of the Corps' NEPA review to the federally controlled aspects of a project. *Sylvester I,* 884 F.2d at 398-99. However, all of these cases concerned the issue of the scope of the Corps' review under NEPA, not its public interest review. In fact, the Ninth Circuit pointed out that the Corps' public interest review encompasses more factors than its NEPA review. *Sylvester v. United States Army Corps of Eng'rs*, ("*Sylvester II*") 882 F.2d 407, 410, n.4 (9th Cir. 1989). The Ninth Circuit stated:

> [t]he Corps regulations require it to consider a broad range of interests that are not included under the 'reasonable alternatives' analysis under the NEPA. . . . Further, under the [Clean Water Act], the Corps is not limited by regulation similar to 33 C.F.R., Pt. 325, App. B., § 7. As a consequence, the Corps could properly consider a wider range of facts in conducting its Public Interest Analysis than the reasonable alternatives analysis.

Id.

The District Court based its holding on the determination that "the language of the regulation defining the focus of the public interest review limits that focus to the effects of the 'proposed activity.' " *Water Works*, 983 F. Supp. at 1067.

However, the public interest review requires an evaluation of not only the impacts of the "proposed activity," but also an evaluation of the impacts of "the proposed activity *and* its intended use on the public interest." 33 C.F.R. § 320.4(a)(1) (emphasis added). The Corps' Appendix B regulations were implemented to set out the parameters of the Corps' review under NEPA for proposed activities that are components of larger projects. *See* 33 C.F.R., Part 325, App. B., § 7(b). NEPA requires the Corps to "study, develop, and describe" alternatives to proposed projects. *See* 42 U.S.C. § 4332(2)(E). The public interest review also requires the Corps to evaluate alternatives to the proposed project but further requires the Corps to evaluate the impacts of the "proposed activity and its intended use," and the "relative extent of the public and private need for the proposed structure or work." 33 C.F.R. § 320.4(a)(1),(2). Accordingly, the public interest review regulations require the Corps to consider factors beyond NEPA's requirements. *See generally* Matthew C. Porterfield, *Rippling Puddles, Small Handles and Links of Chain: The Scope of Environmental Review for Army Corps of Engineers Permit Decisions*, 10 Tul. Envtl. L.J. 31 (Winter 1996). Thus, the two reviews are parallel and separate.

The District Court's decision as affirmed by the Court of Appeals, serves to narrow the scope of the Corps' public interest review for projects requiring permits under Section 404 of the Clean Water Act, and Section 10 of the Rivers and Harbors Act by applying the Corps' NEPA Appendix B regulations to the public interest review. Because this decision raises important questions of federal law regarding whether the Appendix B regulations for NEPA apply to the public interest review, the Court should grant this petition to resolve this issue.

II.

THE DECISION BY THE COURT BELOW RAISES IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING WHETHER SECTION 101(g) OF THE CLEAN WATER ACT LIMITS THE CORPS FROM CONSIDERING THE EXTENT OF THE NEED UNDER ITS PUBLIC INTEREST REVIEW REGULATIONS.

The District Court held, and the Court of Appeals affirmed, that the Corps was not required to evaluate the extent of the need for the water withdrawals in this case because such an evaluation amounts to an allocation of water prohibited by Section 101(g) of the Clean Water Act. *Water Works*, 983 F. Supp. at 1076. The District Court stated "the only activity to be considered in this case is the construction of the intake structure and the associated pipeline crossings. . . ." *Id.* This holding conflicts with the public interest review regulations which require the Corps to evaluate "the relative extent of the public and private need for the proposed structure or work." 33 C.F.R. § 320.4(a)(2).

On appeal to the Court of Appeals, the Corps and Bessemer argued that pursuant to sections 101(g) and 510(2), the Corps' role under the Clean Water Act "is limited to addressing water quality." App. at 99a-109a. Thus, the Corps argued that its needs analysis was limited to the need to construct the intake structure and pipeline along with associated water quality concerns, and it could not consider whether there was a need for the additional water withdrawals from the River, because this amounted to an "allocation" of water. App. at 103a-109a.

This Court has previously held that the Clean Water Act does not make a "sharp distinction" between water quantity and water quality. *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 719 (1994). This Court recognized that issues of water quantity are closely related to issues of water quality, and the continued lowering of the amount of water in a river could eliminate its uses for drinking water, navigation or other uses. *PUD No. 1*, 511 U.S. at 719. Further, this Court stated that the limitations on allocations of water set out in sections 101(g) and 510(2) of the Clean Water Act should be read narrowly. *Id.* at 720. The public interest review regulations clearly require the Corps to evaluate the extent of the need for proposed projects. 33 C.F.R. § 320.4(a)(2). Any meaningful evaluation of a project cannot merely rest upon whether there is a need to construct a structure as if it will not function after the construction is complete, but must further evaluate the extent of the need for the intended use of the structure. In the present case, the intake structure was constructed to withdraw water from the River; thus, the Corps' needs analysis should have considered whether there was a need for the additional withdrawals from the River. Under this Court's narrow reading of sections 101(g) and 510(2), an evaluation of the need for the withdrawals should not amount to an "allocation" of water.

The opinion below interprets sections 101(g) and 510(2) of the Clean Water Act to prohibit the Corps from evaluating the extent of the need for which projects will be used. Based on this ruling, an infinite number of intake structures could be constructed on a water course without regard for whether there was an actual need for the water withdrawals, thereby depleting a precious resource. This Court should grant this petition to resolve this important issue.

III.

THE DECISION BY THE COURT BELOW RAISES IMPORTANT QUESTIONS OF FEDERAL LAW REGARDING WHETHER THE CORPS MAY NARROWLY DEFINE A PROJECT'S PURPOSE TO ELIMINATE REASONABLE ALTERNATIVES.

The District Court held, and the Court of Appeals affirmed, that the Corps had properly defined the project purpose and had properly examined all reasonable alternatives to the project in light of the purpose. The District Court found that the alternative of purchasing water from the Water Works did not conform to the project purpose and thus was not an available alternative. *Water Works*, 983 F. Supp. at 1083. The District Court also found that the Corps had not impermissibly narrowed the project purpose so as to eliminate the alternative of continued purchase of water from the Water Works. *Id.*

Bessemer's permit application stated its project purpose was "future public water supply for the City of Bessemer." In its initial environmental assessment, the Corps restated Bessemer's purpose as "to provide the City of Bessemer with a supply source for their [*sic*] municipal water system." The Corps found that Bessemer's "basic project purpose" was simply "public water supply." However, in its revised environmental assessment, the Corps redefined Bessemer's project purpose as "to provide the City of Bessemer with an independent water system." It is only under this final, narrow project definition that continued purchase of water from the Water Works was not a reasonable alternative.

In *Sylvester v. United States Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989), the court held that "an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable." Likewise, in *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997), the court held that the Corps cannot "contrive a purpose so slender as to define competing reasonable alternatives out of consideration (and even out of existence)." The court explained that the consideration of alternatives is one of the most important evaluations an agency performs, and the beginning point must be defining the project's purpose. *Simmons*, 120 F.3d at 666. The court noted "the broader the purpose, the wider the range of alternatives; and vice versa." *Id.* The court stated further that if an agency narrows the definition of the project purpose to exclude reasonable alternatives, then the agency fails to satisfy its statutory mandates. *Id.* The court held that the alternatives analysis which the Corps should have performed was "an evaluation of alternative means to accomplish the general goal of an action." *Id.* at 669 (citing *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986)). The Corps should not confine its analysis to merely the "alternative means by which a particular applicant can reach his goals." *Id.* (citing *Van Abbema*, 807 F.2d at 638).

The Court of Appeal's ruling in affirming the opinion of the District Court allows the Corps to define and redefine a project's purpose until it is so narrow that it eliminates any undesirable alternatives. Neither the applicant nor the Corps should be allowed to redefine a project's purpose to eliminate reasonable alternatives and circumscribe statutory and regulatory mandates. Thus, this Court should resolve this important issue.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgment and remand the case with directions to enter an order to require the Corps withdraw the permit issued to Bessemer and enjoin the construction, until such time as the Corps has completed the appropriate analysis as required by the Clean Water Act, the Rivers and Harbors Act, and the National Environmental Policy Act.

Respectfully submitted,

K. MARK PARNELL
Counsel of Record
MARY H. THOMPSON
GORHAM & WALDREP, P.C.
Attorneys for Petitioner
2101 6th Avenue North
Suite 700
Birmingham, Alabama 35203
(205) 254-3216